

delay tribal progress in NAGPRA implementation. Mr. Hemenway stated that misunderstanding of the 90-day rule was another barrier to implementation, and asked whether the Review Committee could receive a summary of input received from NAGPRA constituents regarding this issue. Mr. Hemenway stated he appreciated the inclusion of the issue regarding use of the term "cultural item," and added that many tribes consider this to be a very important issue.

Mr. Wright, Jr., asked about the relationship between the grant process and repatriation. Ms. Hutt stated that repatriation grants of up to \$15,000 are available for Indian tribes and/or museums to offset the costs of repatriation. Repatriation grants are noncompetitive and are available from October through June of each fiscal year. In FY 2011, repatriation grants increased over 300 percent. Consultation/documentation grants are competitive, with a submission deadline usually occurring in March of each year. The number of consultation/documentation grants awarded by the grants panel depends upon the balance of grants funds remaining after repatriation grants are paid. Mr. Wright, Jr., encouraged communication with museums, to clarify that completion of the repatriation process is a requirement and not grant-dependent.

Mr. Wright, Jr., asked for clarification of the regulatory rulemaking process for 43 C.F.R. Part 10, specifically notification regarding comment periods. Ms. Mattix stated that all rulemaking within the DOI has to follow the process set forth in the Administrative Procedure Act, which includes notice publication in the Federal Register.

Ms. Atalay thanked the National NAGPRA Program staff for preparing the report, and asked when the report on grants deliverables by Ms. Raether might be available for the Review Committee's consideration. Ms. Hutt stated that the program hoped to be able to support Ms. Raether's efforts to complete a draft of the report for consideration at the Santa Fe, NM meeting.

### **Action Item: Presentation, Discussion, and Approval of the Review Committee's Annual Report to Congress for FY 2011, as Required by NAGPRA (25 U.S.C. 3006 (h))**

#### **Discussion on November 8, 2011**

Ms. Hutt stated that it was the hope of the National NAGPRA Program that the Review Committee would complete its Annual Report to Congress for FY 2011 prior to adjournment of the meeting, which would allow for distribution of the report by the end of the calendar year. Following completion of the report, the National NAGPRA Program will print the report and distribute it to the appropriate Congressional offices. Mr. Simpson stated that the Review Committee members could discuss the report during the meeting and over the course of the evening, voting to approve the final version during the meeting the following day.

Mr. Barker gave a brief summary of the Review Committee's draft report to Congress for FY 2011, copies of which were provided to the Review Committee members for review prior to the meeting. During the meeting, a copy of the draft report was shown by projector for the benefit of the Review Committee members and audience. The Review Committee members offered comments and suggestions for revising the draft report. The Review Committee agreed to incorporate these suggestions over the evening and bring the draft report back for discussion the following day.

#### **Discussion on November 9, 2011**

Mr. Wright, Jr., stated that Mr. Barker was able to incorporate the changes to the report discussed the previous day and provided a copy of the updated report to the Review Committee members. Mr. Barker reviewed the changes incorporated into the report for the benefit of the Review Committee members and those present at the meeting.

The substantive changes include:

- Under discussion of the GAO report, changing "consider the matter closed," to "feeling that the changes they have made since 2008 addressed the problem," as requested by the National NAGPRA Program to more accurately reflect their response to the GAO report.
- At the request of Mr. Wright, Jr., to more properly reflect his testimony to the Senate, adding the notion that not only should human remains be buried and stay buried, but that human remains and associated funerary objects should not be separated.
- To address the concern that certain statements in the report concerning the regulation at 43 C.F.R. 10.11, while they might reflect a 2008 decision of the Review Committee, nonetheless were not necessarily the

- views held by current members of the Review Committee, clarifying the current concerns of the members.
- On the advice of counsel, changing the word “revised” to “amended.”
- Eliminating references to concerns by individual members.
- As discussions of concerns raised by the GAO report have become complicated, expressing the Review Committee’s continuing commitment to a balance between the concerns of all parties to NAGPRA.
- Expressing the Review Committee’s deep appreciation for gifts given to the members out of courtesy, but also explaining that members are constrained by the ethics laws and regulations from accepting some gifts.
- Clarifying the need for additional staffing in the National NAGPRA Program to support the necessary activities to comply with the Act.
- Clarifying Recommendation 7, the definition of Native American, by recognizing that there are strongly held views regarding the definition of “Native American” in the NAGPRA statute, but, nonetheless, emphasizing that Congress needs to address this matter, as it lies outside the jurisdiction of either the Review Committee or the National NAGPRA Program.

#### **Review Committee Motion**

Mr. Barker made a motion that the Review Committee adopt the report to Congress for 2011 to the extent that it is complete, subject to the addition of the description of any action that arose the second day of the meeting. Ms. Farm seconded the motion. The motion was passed by unanimous vote, with one abstention (Mr. Wright, Jr.).

#### **Review Committee Motion**

Following the presentations on November 9, 2011, the Review Committee reviewed Mr. Barker’s additions to the report to Congress for 2011. Ms. Atalay made a motion that the Review Committee approve the report to Congress for 2011. Ms. Farm seconded the motion. The motion was passed by unanimous vote, with one abstention (Mr. Wright, Jr.).

### **Action Item: Appointment of the Subcommittee to Draft the Review Committee’s Annual Report to Congress for FY 2012, and Discussion of the Scope of the Report**

Ms. Farm and Mr. Hemenway volunteered to draft the Review Committee’s report to Congress for FY 2012.

#### **Review Committee Motion**

Mr. Barker made a motion to confirm the appointment of Ms. Farm and Mr. Hemenway to the subcommittee to draft the Review Committee’s Annual report to Congress for FY 2012. Mr. John seconded the motion. The motion passed by unanimous vote.

Mr. Wright, Jr., stated that, while he did vote for this issue, for future issues when serving as Chair he would prefer to cast a vote only when necessary to break a tie. Consequently, all subsequent votes during the meeting were with five voting members (Ms. Atalay, Mr. Barker, Ms. Farm, Mr. Hemenway, and Mr. John).

### **Public Comment – November 8, 2011**

#### **Ms. Patricia Capone**

Ms. Patricia Capone, Associate Curator, Peabody Museum of Archaeology and Ethnology, Harvard University, thanked the Review Committee for the opportunity to participate and thanked the meeting hosts, the Reno-Sparks Indian Colony and the Pyramid Lake Paiute Tribe of the Pyramid Lake Reservation, for their hospitality.

Ms. Capone stated that 23 percent of the Peabody Museum’s overall collections activity relates to NAGPRA. The Peabody Museum has committed significant attention and resources over the years in a good faith effort to implement NAGPRA and cultivate the respectful relationships necessary to this process. The Peabody Museum’s collection is one of the largest and broadest collections subject to the Act and the new rule at 43 C.F.R. 10.11. The Peabody Museum has completed requirements to enable repatriation of approximately 3,137 human remains and over 10,000 funerary objects, representing about 13 percent of the total number available nationally for repatriation. Of these collections, physical repatriation has been completed for 2,924 individual human remains, 3,861 funerary objects, 1 sacred object, 73 objects of cultural patrimony, and 18 objects that are both sacred objects and objects of

1 we go through the discussion this afternoon, if you  
2 feel you would like to say something to be placed  
3 on the record, you are welcome at that point to  
4 make a public comment.

5 **ACTION ITEM: PRESENTATION, DISCUSSION, AND APPROVAL**  
6 **OF THE REVIEW COMMITTEE'S ANNUAL REPORT TO CONGRESS**  
7 **FOR FY 2011, AS REQUIRED BY NAGPRA (25 U.S.C. 3006**  
8 **(h) )**

9 MERVIN WRIGHT, JR.: Okay. So the next item is  
10 the presentation and discussion of the Review  
11 Committee Annual Report to Congress Fiscal Year  
12 2011, presentation by Alexander Barker and myself,  
13 Mervin Wright, and I would like to ask that this  
14 item not be considered for approval at this time.  
15 Can I do that as the Chair, with regard to the  
16 agenda?

17 DAVID TARLER: Mr. Chairman, we would wish that  
18 there be a discussion of the draft report and that  
19 the Review Committee either approve or  
20 conditionally approve the report, so that if all  
21 the conditions are satisfied, that report will go  
22 to the National NAGPRA Program. And we will  
23 process that report, put it into final form, and  
24 distribute it to Congress.

25 MERVIN WRIGHT, JR.: Well, there is a

1 placeholder in the report for this meeting here  
2 that needs to include, you know, what we do here in  
3 this meeting, and plus there are — I have a number  
4 of comments and corrections that need to be  
5 included. And that's why I was asking if we can  
6 not approve it at this time but — I mean, we're  
7 going to eventually have to approve it.

8 DAVID TARLER: One other possibility,  
9 Mr. Chairman, is to discuss what is included in the  
10 report and what you would like to include in the  
11 report that is not connected to this particular  
12 meeting, and then perhaps to revisit the draft  
13 report tomorrow, and at that time considering your  
14 recommendations and whatever you vote on this  
15 afternoon to be included in the report, you might  
16 feel that you can conditionally approve the report  
17 at that time.

18 MERVIN WRIGHT, JR.: Okay. We'll stick to the  
19 time frames of the agenda, and should we run out of  
20 time we will continue the discussion on the report  
21 tomorrow, during tomorrow's session. So at this  
22 time I'll turn it over to Mr. Barker.

23 ALEXANDER BARKER: Thank you, Mr. Chair. Is it  
24 possible to have the text of the report put up on  
25 the screen, so if there are comments or questions

1 both members of the Review Committee and the  
2 audience will be able to see the text involved?

3 I will spare the committee a reading of the  
4 draft report, since it runs to 23 single-spaced  
5 pages, and simply note that it consists of five  
6 major sections: a description of the activities of  
7 the Review Committee over the course of the past  
8 year, a summary of NAGPRA activities by Federal  
9 agencies, museums and tribes, a discussion of the  
10 progress over the year to date and of the barriers  
11 encountered, and a series of seven recommendations.

12 At this point - and again this is prior to  
13 approval by the Review Committee, it's simply a  
14 draft - those seven recommendations are: an  
15 increase in funding for the NAGPRA Program, its  
16 budget has remained flat for quite some time now;  
17 recommendation for a GAO study of compliance by  
18 museums, tribes and other entities, basically to  
19 complete the process that was begun with the GAO  
20 report on compliance by the National NAGPRA Program  
21 and Federal agencies, the second report on the  
22 Smithsonian museums, and a final report on the  
23 remaining entities concerned with NAGPRA; a  
24 recommendation to enact further legislation to  
25 protect Native American burials; a recommendation

1 to open Congressional hearings to determine  
2 progress made and barriers encountered in the  
3 implementation of NAGPRA; a recommendation to  
4 develop specific mechanisms to clarify  
5 responsibility for certain Federal collections, and  
6 this specifically deals with collections which are  
7 federally associated but held in a non-Federal  
8 museum or repository, so that through clear and  
9 structured discussions it's clear what entity is  
10 responsible for making sure those collections are  
11 fully inventoried and documented; a recommendation  
12 to revise regulations under 43 C.F.R. 10, and  
13 particularly 43 C.F.R. 10 Section 11, which follows  
14 on a previous recommendation by the Review  
15 Committee at its 44<sup>th</sup> meeting in Syracuse; and  
16 finally, a recommendation that Congress consider  
17 changing the definition of Native American, what's  
18 sometimes called the "is/was" discussion.

19 Rather than going through the details of the  
20 report, which has been distributed to members of  
21 the Review Committee, I would respectfully ask the  
22 Chair if you'd open discussion to the rest of the  
23 committee regarding revisions, changes or  
24 additions.

25 MERVIN WRIGHT, JR.: Thank you, Alex. So at

1       this time, I'll open it up for the committee for  
2       comments, questions and discussion regarding the  
3       draft report.

4               Well, I'll start. I'll just start with just  
5       the one issue that I am part of, in three places in  
6       this report regarding the -- the testimony that I  
7       gave at the June 16<sup>th</sup> Senate Committee Hearing this  
8       year, and the correction is that on page 6 that I  
9       was representing the -- I was not representing the  
10      Review Committee or I was not representing in a  
11      capacity as a member of the Review Committee but I  
12      was there as the tribal Vice-Chairman of the  
13      Pyramid Lake Paiute Tribe, and that after Native  
14      Americans to have their ancestral tradition and  
15      culture treated and respected including the right  
16      to be buried and to stay buried, and that the  
17      burial rite includes human remains and the funerary  
18      objects together and cannot be separated.

19             And further in the report, on page 7, it did  
20      talk about the Syracuse meeting and the actions  
21      that we took regarding the 2010 report to Congress,  
22      and where it says Mr. Wright, regarding the 2010  
23      Review Committee report to Congress because of its  
24      endorsement of these regulations, it was really  
25      about the level of endorsement because the report

1 originally said that the committee was very pleased  
2 with the 43 C.F.R. 10.11 regulations, and my – and  
3 it is clear here that my concern is that there was  
4 disagreement on both the tribal side, as well as  
5 the scientific side, of that rule. And I can't  
6 speak for the scientific side, only that the  
7 biggest concern with the rule is that it separates  
8 the funerary objects from the human remains. And  
9 basically in the sense that the tribes can get the  
10 human remains repatriated but the museums get to  
11 keep the funerary objects that is my only concern.

12 And when it goes further to talk about the  
13 Review Committee's earlier draft versions of the  
14 regulations in 2008, I am not in agreement with  
15 those. I'm certainly aware that the position was  
16 that it was going to treat science equal to the  
17 status of Indian tribes and that tribes are  
18 stakeholders or considered stakeholders, and I'm  
19 not in favor of that. So this can either be  
20 revised or reworded so that there is a clear  
21 disconnect between my testimony and the 2008  
22 position on the regulations, because I don't think  
23 the 2008 position on the regulations are what in  
24 place.

25 And then again on page 19, it makes the same

1 reference, and I think it's more of a reiteration  
2 on page 19. And I mean I might just strike that  
3 whole - strike that whole paragraph. So I think -  
4 I mean, I've got comments throughout, and I would  
5 like to strike a couple other paragraphs, but you  
6 know, in the sense of what we're supposed to  
7 represent, and clearly in Syracuse as well as in  
8 Washington, DC, at those two meetings when the GAO  
9 reported, I think the biggest finding in that  
10 report was that the Review Committee is biased  
11 towards tribes. And I feel that this report, as  
12 the past reports have, indicated an objective and  
13 unbiased position of the committee. And I think  
14 that, you know, I mean, the law as it was  
15 negotiated prior to 1990 in all of the negotiations  
16 that went on, there were certain principles, there  
17 were certain concessions, and it was enacted. And  
18 I think some of what the report indicates is that  
19 we're concluding that with regard to the law it's  
20 stating what Congress did not state with its  
21 intention and that we're basically stating  
22 something other than what Congress stated in their  
23 enactment of the law.

24 Are there any more comments from the  
25 committee? Eric.

1           ERIC HEMENWAY: I have some recommendations for  
2           page 22, under Recommendation 7, and I would ask  
3           that the second paragraph be struck completely. As  
4           a representative of traditional Native peoples here  
5           in the United States, this troubles me a little bit  
6           because in the paragraph it states that making all  
7           human remains prior to a certain date,  
8           quote/unquote, "Native American by statute and  
9           subject to disposition to tribes or Native American  
10          communities, even in the absence of any evidence of  
11          descent, kinship or cultural affiliation." That  
12          really kind of cuts to the core of a lot of  
13          problems with museums and tribes on affiliation and  
14          actual repatriation, and there is evidence that  
15          there is cultural affiliation that there is  
16          kinship, if consideration was given to tribe's oral  
17          histories and oral traditions and so on and so  
18          forth.

19                 And then the second part that also I have  
20                 trouble with is "The Act clearly envisioned a  
21                 balance between valid rights of tribes and Native  
22                 communities to reclaim ancestral remains and  
23                 control their treatment with the valid right of the  
24                 public to understand." From a tribal aspect, the  
25                 Act was created to see Native rights upheld and

1 carried out. So this balance, it's hard to  
2 achieve, but I think in the end I always come back  
3 to that this is Indian law and that it's created  
4 for Indians for specific purposes, so I would like  
5 to see that entire paragraph struck.

6 MERVIN WRIGHT, JR.: Thank you, Eric.

7 Also in the first paragraph, you know, our  
8 recommendation, and I remember my first meeting in  
9 Sarasota, Florida, when I brought up the  
10 reaffirmation of the amendment of the definition of  
11 Native American, the action of the committee was to  
12 reaffirm the amendment of the definition, and I  
13 believe it was just that, we recommend that  
14 Congress enact legislation to amend the - amend the  
15 definition and not to open hearings to consider  
16 whether to amend the definition. So I would strike  
17 the words "open hearings to consider whether to,"  
18 that we recommend that Congress amend the Act by  
19 changing the definition of Native American so that  
20 it's consistent with the action of the committee in  
21 the past.

22 Sonya.

23 SONYA ATALAY: Yeah, along those same lines, I  
24 think that, again, under Recommendation 7, the - I  
25 think it's the final two sentences of the first

1 paragraph, beginning with "This is a complex and  
2 contentious issue largely reflecting a desire on  
3 the part of many tribes and Native communities to  
4 reverse what they feel was an inappropriate  
5 judicial decision by the Ninth Circuit Court,"  
6 etcetera, and it goes on. I just want to raise the  
7 point that perhaps we could find some way to rework  
8 that sentence, possibly just leaving it as "This is  
9 a complex and contentious issue," because I think  
10 there's quite a bit of, at least, academic  
11 literature out there, speaking as an archeologist,  
12 about this issue. And in fact, it's not as simple  
13 as saying archeologists and museum people feel this  
14 way or Native people feel such and such way. There  
15 are quite a few archeologists and museum people  
16 that I know quite well and who've talked about this  
17 extensively in the literature that wouldn't agree  
18 with what's written here, and I don't think that  
19 many members of this committee would necessarily  
20 agree with it also.

21 So just thinking that - just leaving it as  
22 saying, "This is a complex and contentious issue,"  
23 and that there are views on each side, but I guess  
24 my issue was with just saying that this - wanting  
25 to have such an amendment is not necessarily about

1       trying to reverse the Kennewick Man case. I think  
2       that's problematic to say, so I think that should  
3       be also taken out or reworked. Just noting the  
4       complexity is a great thing, and I think maybe even  
5       one sentence on there are several different views  
6       and saying that those are some of the views that  
7       have come up. That would be fine. I'd be willing  
8       to work within that.

9               MERVIN WRIGHT, JR.: I did rewrite the  
10       sentence, but to include the Ninth Circuit decision  
11       — I mean this is not about Kennewick. Kennewick is  
12       done, you know. It's finished. And I know that  
13       Senator Stevens — when this issue went before  
14       Congress for enactment, that was their issue, and  
15       it was the issue last year when we went up on the  
16       Hill to discuss this issue, that they feel is going  
17       to reverse — somehow reverse Kennewick. That's not  
18       the case here. Kennewick's done, and so I would  
19       say just end it with them, "This is a complex and  
20       contentious issue," and just leave it at that.

21              Sonya.

22              SONYA ATALAY: Yeah, another point is  
23       throughout the document, particularly — I think  
24       it's actually only in speaking about revising 43  
25       C.F.R. 10.11, in some places the word "revise" is

1       used and I think it may be – I'm just going to  
2       propose that we change that to "amend." I think –  
3       and that's something we could discuss, but I just  
4       think for me, I think that's consistent with what  
5       the committee has talked about before. It gets  
6       back to some of the issues that Mervin raised, but  
7       also just to think about using the word "amend"  
8       instead of "revise."

9               And there's another point that I wanted to  
10       raise about that as well – oh, it was just a  
11       suggestion. On page 7, and Mervin's talked about  
12       this, my suggestion was just to kind of say that  
13       yes, there were concerns that different groups have  
14       about 43 C.F.R. 10.11, but that there's a range of  
15       concerns here, and those are quite different, and I  
16       think we could very clearly say – I'm not saying  
17       that we have to only say one particular concern, I  
18       think we could list several of the concerns. But I  
19       think just not conflating what Mervin spoke about  
20       and testified to in the same way with the 2008  
21       regulations, for example, not combining those as if  
22       they're the same concerns would help to solve  
23       those. So I think we could just really clearly  
24       highlight that these are some of the concerns that  
25       the committee has had, members of the committee

1 have had, bullet-pointed, would help to address  
2 that.

3 MERVIN WRIGHT, JR.: And also, in that same  
4 paragraph where it talks about, you know, being  
5 unanimous, either unanimous consent or unanimous  
6 opinion, my position on 43 10.11 is what I said  
7 earlier, is the separation of the funerary objects  
8 from the human remains. That is my major concern.  
9 That is not to say that that opinion or that  
10 position is shared with the rest of the committee.  
11 So to say unanimous consent I think is misleading.

12 And so as Sonya is referring to it, it should  
13 be stated that there are a number of issues that  
14 are observed, recognized, acknowledged by the  
15 committee and that it might be better listing them  
16 instead of, you know, trying to - rolling it all  
17 into one statement that we're all in agreement that  
18 they're flawed and need to be revised. Some regard  
19 - well, in a general sense, just state that it  
20 needs amendment, consideration for amendment or to  
21 be amended. That's what - I think that's what's  
22 important here.

23 In the second sentence down at the bottom of  
24 page 7, I read, you know, where it talks about 43  
25 10.11 noting that, "1) the protections from

1 liability for museums included in Section 7 of the  
2 Act are not explicitly extended under Section 10.11  
3 of the regulations, so institutions might be placed  
4 in legal jeopardy for compliance." I'm not certain  
5 if we're supposed to make those kind of warnings  
6 publically like this, I mean, even though we are  
7 here in this public session. It's in here, and I  
8 don't know if the committee should be taking the  
9 position to warn museums or institutions that, hey,  
10 you guys could be liable if you do something or if  
11 you don't do something.

12 ALEXANDER BARKER: Mr. Chair, if I might speak  
13 to that.

14 MERVIN WRIGHT, JR.: Yes, sir.

15 ALEXANDER BARKER: The point being raised is  
16 that this is a concern about the current Section  
17 10.11 regulations. It certainly wouldn't provide  
18 any reason for a museum not to comply because  
19 they'd be under threat of liability whatever they  
20 did. The point is that a specific section of the  
21 statute is not extended under Section 10.11 and  
22 that, I think, is more than anything else a  
23 clarification.

24 MERVIN WRIGHT, JR.: Thank you.

25 Sonya.

1           SONYA ATALAY: So then perhaps what we could do  
2 is have again a bulleted point saying here are some  
3 of the amendments we propose, maybe even language  
4 or something like that. Do you - I think that that  
5 would work for all the points that are here.

6           MERVIN WRIGHT, JR.: I don't know about  
7 language, but I think we can bullet point the  
8 concerns that we have and, you know, let the bill  
9 writers, the drafters of that be concerned with  
10 that.

11           I would also say that further, on page 8 in  
12 that same paragraph down below, where it talks  
13 about "creating an odd situation wherein culturally  
14 unidentifiable human remains are exempt from  
15 scientific study, but culturally affiliated human  
16 remains are not," informed consent is clearly in  
17 the law and that's what this is about. You know  
18 the law basically gives the tribes and museums the  
19 opportunity to obtain informed consent, and it's  
20 not unilateral consent, you know, to think that  
21 somehow study can be exempt, you know, and I don't  
22 know if we want to imply that that's what we want.  
23 I mean, certainly it can be listed as an issue of  
24 concern, but I don't - I mean, that was the big -  
25 one of the biggest issues of negotiating the

1       legislation was having the right to study, and the  
2       law does provide for that right to study upon  
3       receiving consent. And so I think the underlying  
4       premise in the law is to have that informed  
5       consent. And so advocating, you know, that the  
6       right of possession or having any link to  
7       possession gives any consent to study, I don't  
8       think that's what we're implying here.

9               The second — the next paragraph goes into  
10       talking about the collections in museums, and the  
11       impression that I got from this is that especially  
12       when it comes to controlling collections, I got the  
13       impression that along with the funerary objects and  
14       the objects of cultural patrimony, sacred objects,  
15       there's a clear distinction between what is  
16       property and what is not. Here, though, with the  
17       human remains, it combines that. It like makes it  
18       one of the same. That's my impression in reading  
19       this. And I know that human remains are not  
20       property, and so I just raise the question here  
21       with regard to — you know, we need to clarify this,  
22       because I certainly appreciate, you know, the  
23       effort to talk about the control of these  
24       collections, but the law, again, is set to give  
25       tribes the opportunity to give consent and that

1 unilateral consent is just not given.

2 Sonya.

3 SONYA ATALAY: And just one - I think this is  
4 my final point, is on page 11, at the bottom of  
5 page 11, this is in a section entitled, "Other  
6 Review Committee Matters." It's the final  
7 paragraph here. It's talking here again about the  
8 GAO report, the recognized "perceived bias," in  
9 quotes, of the Review Committee toward tribal  
10 interests. And then it says that in our 2010  
11 Report to Congress we took exception with that, and  
12 then there's a section here that says,  
13 "unfortunately actions at the November 2010 meeting  
14 raised a number of issues currently being  
15 reviewed," and it goes on to talk about that. And  
16 I would just suggest that we remove this section.  
17 I think that it's - I think that - I don't agree  
18 with that. I don't think that - I think what we  
19 saw at the November 2010 meetings were some issues  
20 that we did our very best to discuss. They were  
21 very difficult issues to handle. We talked about  
22 those issues, and why what happened happened when  
23 we were trying to work between a very legal system  
24 that's necessarily a legal system and the interests  
25 of tribes and tribal protocols, and how difficult

1           that is, how very challenging that is.

2           So I would be more comfortable framing it in  
3           that way. I don't think that I thought - I think  
4           what we saw was the committee grappling - we were  
5           grappling with those issues, and we do it in a very  
6           public forum. And it's very difficult and  
7           challenging, as anyone who's done NAGPRA work  
8           knows. But I don't think that that led to an  
9           increase - increasing a perceived bias, so I would  
10          just request that that section be taken out or  
11          detailed in another way that adds that complexity  
12          that we're talking about.

13          MERVIN WRIGHT, JR.: Well, it also - it drives  
14          questions, which I'm certainly not going to ask  
15          here, but I would be happy to ask Dave and Carla  
16          and Stephen, you know, aside, you know, about the  
17          review of these issues in front of the Department,  
18          the Ethics Office and the Division of General Law.

19          DAVID TARLER: Mr. Chairman?

20          MERVIN WRIGHT, JR.: Yes, sir.

21          DAVID TARLER: If there is no further  
22          discussion among the Review Committee at this time  
23          concerning the draft report, I have two requests.  
24          First, I would request that the Chair call on  
25          Sherry Hutt to reiterate again the importance of

1       timely submitting the Review Committee's Report to  
2       Congress, and second, to make some technical  
3       clarifications with respect to the latest draft  
4       report. And second, I would like to address the  
5       Review Committee and make a recommendation with  
6       respect to what action it might take this evening  
7       and tomorrow.

8               SHERRY HUTT: Well, I think (comment inaudible)  
9       put in there, that's within the committee as you go  
10      work through this. I think where we're headed is  
11      you all want to sort of work on this together. Is  
12      there any prohibition to the Review Committee  
13      sitting around a dinner table and actually  
14      hammering out the language, and then coming back  
15      tomorrow with a revised document that you feel  
16      comfortable moving and voting on various portions  
17      thereof?

18              STEPHEN SIMPSON: Not in the Federal Advisory  
19      Committee Act or in the committee's procedures, so  
20      you can certainly do that.

21              DAVID TARLER: In that case, Mr. Chairman, my  
22      recommendation is that the Review Committee get  
23      together this evening and discuss proposed language  
24      for the draft report, perhaps reach consensus on  
25      that language, and then tomorrow have a discussion

1 of the report during the meeting tomorrow.

2 MERVIN WRIGHT, JR.: That sound okay with the  
3 committee members? Okay. We'll do that.

4 So at this time, then, we will I guess hold  
5 our discussions, further discussions on the draft  
6 2011 Report to Congress, and we will move on to our  
7 next agenda item, which is the appointment of a  
8 subcommittee to draft the Review Committee's annual  
9 report to Congress for Fiscal Year 2012 and a  
10 discussion of the scope of the report.

11 **ACTION ITEM: APPOINTMENT OF THE SUBCOMMITTEE TO**  
12 **DRAFT THE REVIEW COMMITTEE'S ANNUAL REPORT TO**  
13 **CONGRESS FOR FY 2012, AND DISCUSSION OF THE SCOPE**  
14 **OF THE REPORT**

15 MERVIN WRIGHT, JR.: So at this time I'll open  
16 it up to the Review Committee for discussion.

17 Do we have any - well, I'll just start by  
18 asking if we have any volunteers?

19 You're volunteering, Eric? Okay. I don't  
20 think volunteering works that way.

21 LINDALEE FARM: Mr. Chair?

22 MERVIN WRIGHT, JR.: Yes.

23 LINDALEE FARM: Since I have never done one of  
24 these, I will volunteer to take the laboring or -  
25 on the next report, with the help and assistance of

1 that you might address that topic.

2 **ACTION ITEM: PRESENTATION, DISCUSSION, AND APPROVAL**  
3 **OF THE REVIEW COMMITTEE'S ANNUAL REPORT TO THE**  
4 **CONGRESS FOR FY 2011, AS REQUIRED BY NAGPRA -**  
5 **CONT'D**

6 MERVIN WRIGHT, JR.: All right. That sounds  
7 like a - that's a good suggestion, and I think with  
8 the consent of the rest of the committee, I guess  
9 we can move to look at the draft report to Congress  
10 on behalf of the Review Committee.

11 **REVIEW COMMITTEE MOTION**

12 SONYA ATALAY: So moved.

13 MERVIN WRIGHT, JR.: Is there a second?

14 ADRIAN JOHN: I'll second.

15 LINDALEE FARM: Second.

16 MERVIN WRIGHT, JR.: Motion made and seconded  
17 to consider the draft report to Congress by the  
18 Review Committee for 2011. I guess we'll just do  
19 the vote. Signify by saying aye, go down the line?

20 DAVID TARLER: Oh, sure.

21 MERVIN WRIGHT, JR.: Mr. John - oh, go ahead.

22 DAVID TARLER: Is this to consider or is this  
23 to approve?

24 MERVIN WRIGHT, JR.: I believe it's the  
25 conditional approval that you suggested yesterday.

1           DAVID TARLER: So you're voting to  
2           conditionally approve the report to Congress?

3           MERVIN WRIGHT, JR.: Yeah, we need to include -

4           DAVID TARLER: As revised.

5           MERVIN WRIGHT, JR.: Right.

6           DAVID TARLER: Okay. Oh, and what are the  
7           conditions or the condition for approval?

8           Mr. Barker, do you want to tell us what the -  
9           why this is a conditional approval as opposed to an  
10          approval?

11          ALEXANDER BARKER: I'm sorry I can't speak to  
12          that. I can speak to the revisions that were made.

13          MERVIN WRIGHT, JR.: The inclusion of these  
14          proceedings need to be put into the report, and  
15          therefore since it's currently not in the report,  
16          that's the condition. And you know, I thought  
17          about it last night and this morning, and I don't  
18          know if it - you know, when we get to that point of  
19          the formal approval by the committee, is that going  
20          to be a step in this process that we'll have the  
21          opportunity to formally approve it at some point  
22          when these proceedings are included in the report?

23          DAVID TARLER: My understanding, Mr. Chairman,  
24          is in order to approve a report, if it's not a  
25          conditional approval, that you would have to do

1       that at a public meeting, and counsel apparently  
2       concurs.

3               So if this is a conditional approval, and the  
4       condition is the inclusion of the events that take  
5       place during this meeting, then if those events are  
6       included in the report, and it's conditionally  
7       approved, then it is considered to be approved.

8               STEPHEN SIMPSON: That's correct, Mr. Chairman.

9               SHERRY HUTT: May I ask, Mr. Chair, did you  
10      want the program to put an Executive Summary on  
11      front and then pass it along to you, having already  
12      approved that report, to see before it goes up to  
13      the Secretary?

14              MERVIN WRIGHT, JR.: The Executive Summary -

15              SHERRY HUTT: If you like (inaudible comment).

16              MERVIN WRIGHT, JR.: Yeah, I'm not very  
17      comfortable with the conditional approval turning  
18      into a formal approval, without having first seen  
19      the final version of the report, because - I mean,  
20      if there's something in there that we may, not  
21      necessarily object to but have reservations about,  
22      it would be too late to have any say whether we can  
23      change or make any revision.

24              CARLA MATTIX: Right. I think basically if  
25      it's conditionally approved and you trust the

1 program to put in today's meeting - this meeting's  
2 events, then it will be approved. You won't have  
3 another opportunity to make comments on it. If you  
4 want to have an opportunity to make comments on it,  
5 that would not necessarily be a conditional  
6 approval, because you still want to comment and  
7 approve it, so that could not be formally approved  
8 until the next meeting of the committee.

9 ALEXANDER BARKER: Mr. Chairman?

10 MERVIN WRIGHT, JR.: Yes, Mr. Barker.

11 ALEXANDER BARKER: Can I recommend that we  
12 postpone making a decision on this issue. I  
13 believe that if we take a brief break after we've  
14 completed most of the other business of the  
15 committee, we can prepare that text for what  
16 occurred at this meeting. And therefore have a  
17 complete report, lacking only an Executive Summary,  
18 which is normally prepared by the National NAGPRA  
19 Program in any event, and then we could vote on a  
20 complete report instead of having to delay the  
21 report until the next meeting.

22 MERVIN WRIGHT, JR.: By the end of the day.

23 ALEXANDER BARKER: Correct.

24 MERVIN WRIGHT, JR.: Okay. All right. We'll  
25 move forward then and take a look at the report and

1 the changes that were made since yesterday. I  
2 think, Lesa, do you have them available?

3 LESA KOSCIELSKI: Yes.

4 MERVIN WRIGHT, JR.: We received, I believe, a  
5 draft this morning by email from Mr. Barker, and I  
6 just want to express my appreciation and thanks to  
7 him for the time and effort that he's put into  
8 getting this to this point of our consideration at  
9 this point and discussion.

10 So it's up on the screen now, so we'll go from  
11 here. I'll open it up for discussion for the  
12 committee.

13 ALEXANDER BARKER: (Inaudible comment.)

14 MERVIN WRIGHT, JR.: I think we'll review -  
15 first, we'll review the changes that have been  
16 made, and then we will discuss any further  
17 amendments that need to be included. I'll turn it  
18 over to Mr. Barker.

19 ALEXANDER BARKER: In that case, if I could ask  
20 as we scroll through the screen, all the changes  
21 have been marked, so they should be apparent to  
22 both the committee and the audience. These are  
23 changes that were made by a subcommittee of the  
24 Review Committee last evening based on the initial  
25 draft that had been discussed yesterday. All of

1 the changes that have been made – I can't make the  
2 light any greener than this. I'll just step closer  
3 to the mic.

4 So all the changes that have been made from  
5 the draft that was discussed at yesterday's meeting  
6 are highlighted in this current text. This change  
7 is one that was requested by the National NAGPRA  
8 Program to more correctly reflect their response to  
9 the GAO report. It's simply changing the text from  
10 "considering the matter closed," to "feeling that  
11 the changes they have made since 2008 addressed the  
12 problem."

13 This is a change requested by Mr. Wright to  
14 more properly reflect his testimony to the Senate,  
15 and it adds the notion that it's not simply a  
16 matter of remains should be buried and stay buried  
17 but also making clear that human remains and  
18 funerary objects couldn't be separated.

19 Concerns were raised by some members of the  
20 Review Committee that certain statements in this  
21 passage reflected too much on the 2008 decision of  
22 the Review Committee and weren't necessarily held  
23 by the current members of the Review Committee.  
24 And so a series of changes were made. It doesn't  
25 change the actual text in any significant way. It

1 just makes clear that the concerns with 43 C.F.R.  
2 10.11 are based on current concerns by the current  
3 committee rather than reflections back to the 2008  
4 draft considered by an earlier committee. We also  
5 changed "revised" to "amended" on the advice of  
6 counsel.

7 In the initial draft, the plan had been that  
8 all the members of the Review Committee would list  
9 their concerns so that they were clear to Congress.  
10 Since that became unworkable because of the late  
11 hour, we simply eliminated any reference to  
12 individual concerns by Review Committee members.

13 Discussion of concerns raised in the GAO  
14 report became a fairly complicated topic, and  
15 rather than trying to address all of the different  
16 issues concerned, we simply wanted to express the  
17 committee's continuing commitment to a balance  
18 between the concerns of all parties to NAGPRA.

19 As noted previously, this refers back to the  
20 2008 committee, and we wanted to make clear that  
21 these were concerns held by the 2011 committee.

22 A concern had been raised at a previous  
23 meeting regarding gifts that were given to Review  
24 Committee members as a courtesy by various groups.  
25 These were intended simply as a courtesy, but

1 because of the requirements of the FACA Act, they  
2 represented a technical violation of ethics rules.  
3 We wanted to make this clear in the report to  
4 Congress, so it was clear that the gifts were  
5 intended as courtesy and we were deeply  
6 appreciative of them, but we were constrained by  
7 FACA ethical guidelines from accepting them. We  
8 wanted to acknowledge the courtesy of the givers,  
9 while also explaining why we were unable to accept  
10 the gift.

11 Clarification was made regarding the use of -  
12 or concerns about the lack of funding for the  
13 National NAGPRA Program, and we wanted to be clear  
14 about the need for additional staffing to support  
15 the necessary activities going on to comply with  
16 the Act.

17 This was a clarification of what was intended.  
18 The text itself doesn't change, but the running  
19 title was changed to be more clear and to more  
20 specifically refer to the things being recommended  
21 in the passage that follows.

22 For the sake of brevity, we left out a longer  
23 discussion of reasoning. It seems pretty self-  
24 evident from the passage that goes before.

25 Recommendation 7, concerning the definition of

1 Native American, is something that appeared in  
2 previous recommendations to Congress. It's changed  
3 here only to the extent that it recommends that  
4 Congress consider the amendment and recognize that  
5 there are strongly held views on all sides and that  
6 this is an important topic that Congress needs to  
7 address because it's beyond the capacity of either  
8 the Review Committee or the National NAGPRA Program  
9 since it's a matter of statute.

10 And those are all the changes that were made.  
11 None of the recommendations changed in substance,  
12 nor were there any changes to the overall successes  
13 or barriers that were encountered. Thank you.

14 MERVIN WRIGHT, JR.: Thank you, Alex.

15 With regard to recommendation number seven,  
16 you know, I know that the terminology is sometimes,  
17 you know, debated and what it means and how it's  
18 read and the impression that is given, so the  
19 committee basically changed on that recommendation  
20 number seven from requesting Congress to amend the  
21 definition in the legislation to asking Congress to  
22 consider amending the definition. So there is a  
23 change there, but I don't think it - I don't think  
24 it's going to condition the efforts of tribes on  
25 their own behalf, if they want to lobby Congress to

1 seek an amendment. I think on behalf of the  
2 committee it represents what it represents, and  
3 when this time comes for legislation to be  
4 introduced at the congressional level, we feel that  
5 the committee's recommendation will be addressed by  
6 hopefully the committee and whoever is going to be  
7 considering the amendment to the legislation.

8 Is there any further discussion from the  
9 committee regarding the report to Congress?

10 **REVIEW COMMITTEE MOTION**

11 ALEXANDER BARKER: Mr. Chairman, if I could  
12 then move that we adopt this report to this extent,  
13 and then later on in the meeting we can vote on the  
14 actual text for the remaining passage for what  
15 occurred at this meeting.

16 MERVIN WRIGHT, JR.: Okay. There is a motion  
17 to approve the report to this extent at this time.  
18 Is there a second?

19 LINDALEE FARM: I'll second it.

20 MERVIN WRIGHT, JR.: Okay. So at this time,  
21 we'll do the voice vote of our committee members.

22 DAVID TARLER: And I'll call each member  
23 individually. Sonya Atalay?

24 SONYA ATALAY: Yes.

25 DAVID TARLER: Alexander Barker?

1 ALEXANDER BARKER: Aye.

2 DAVID TARLER: LindaLee Cissy Farm?

3 LINDALEE FARM: Aye.

4 DAVID TARLER: Eric Hemenway?

5 ERIC HEMENWAY: Yes.

6 DAVID TARLER: Adrian John?

7 ERIC HEMENWAY: Yes.

8 DAVID TARLER: And I understand that the Chair  
9 is not voting.

10 MERVIN WRIGHT, JR.: I would prefer not to  
11 vote, yeah.

12 Okay. So the motion carries, and so we will  
13 at some point this morning, later this morning, we  
14 will get to a point where we will do our best to  
15 include the proceedings of this meeting here in  
16 Reno into the 2011 Report to Congress. And so at  
17 this time, we are a bit ahead of schedule, so the -  
18 I notice some folks came in the room. Have the  
19 representatives from the Los Angeles County, are  
20 they here?

21 Okay, so we will move then to that item on the  
22 agenda, a request by Los Angeles County,  
23 California, that the Review Committee act on an  
24 agreement to reinter human remains and associated  
25 funerary objects determined to be culturally

1 with our business. Thank you.

2 Okay. We're going to bring our report back up  
3 onto the screen, I believe, and we'd like to just  
4 review the revision, what's being incorporated from  
5 today's discussion and then we'll act upon the  
6 report. I'll turn it over to Mr. Barker.

7 **ACTION ITEM: PRESENTATION, DISCUSSION, AND APPROVAL**  
8 **OF THE REVIEW COMMITTEE'S ANNUAL REPORT TO THE**  
9 **CONGRESS FOR FY 2011, AS REQUIRED BY NAGPRA -**  
10 **CONT'D**

11 ALEXANDER BARKER: Thank you, Mr. Chair. I'd  
12 also note for the benefit of all concerned that one  
13 of the reasons that the committee is doing this in  
14 this way is that in past years the Review  
15 Committee's report to Congress was not approved  
16 until the next year, the first meeting of the next  
17 year. And after formatting, approval and  
18 transmittal, this meant that the Congressional  
19 report didn't reach Congress until long after any  
20 opportunity for Congress to take action on the  
21 report had passed. The goal now is to make sure  
22 that the report goes in in an expeditious manner,  
23 and so we're now trying to assure that the  
24 committee - the report to Congress reaches Congress  
25 immediately after the end of the year.

1           The changes that have been made – if you could  
2 scroll to page 9, please – one small technical  
3 change was made after discussion with counsel  
4 regarding the role of the Secretary in – right  
5 there. And my understanding from counsel is that  
6 this is slightly broader language, but it's not a  
7 change in substance.

8           And then pages 11 to 14, simply insert  
9 language from this meeting describing the  
10 activities of the Review Committee and the comments  
11 that we heard from the public as part of this  
12 meeting.

13           And I believe most members of the Review  
14 Committee have already had an opportunity to review  
15 this text, and I'd be happy to answer any questions  
16 or entertain any revisions or changes. If there  
17 are none, can we have a motion for approval?

18           MERVIN WRIGHT, JR.: At this time, I'll  
19 entertain a motion to approve our 2011 report to  
20 Congress.

21           **Review Committee Motion**

22           SONYA ATALAY: So moved.

23           MERVIN WRIGHT, JR.: Is there a second?

24           LINDALEE FARM: Second.

25           ADRIAN JOHN: I'll second.

1 MERVIN WRIGHT, JR.: Second and third.

2 All right. So at this time, we'll call for  
3 the questions. I'll ask Mr. Tarler.

4 DAVID TARLER: So I'll call the — I'll call the  
5 names of the Review Committee members for approval  
6 of the 2011 Review Committee report to Congress.

7 Sonya Atalay?

8 SONYA ATALAY: Yes.

9 DAVID TARLER: Alexander Barker?

10 ALEXANDER BARKER: Aye.

11 DAVID TARLER: LindaLee Cissy Farm?

12 LINDALEE FARM: Aye.

13 DAVID TARLER: Eric Hemenway?

14 ERIC HEMENWAY: Yes.

15 DAVID TARLER: Adrian John?

16 ADRIAN JOHN: Yes.

17 DAVID TARLER: And Chairman Mervin Wright is  
18 not voting.

19 MERVIN WRIGHT, JR.: Correct. The motion  
20 carries. At this time, I'd like to call upon  
21 Mr. Ralph Burns before we adjourn.

22 Oh, okay, Mr. Tarler.

23 **CLOSING COMMENTS**

24 DAVID TARLER: At this time, Mr. Chairman,  
25 again I would like to thank our hosts at this 45<sup>th</sup>